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No. 87-1252

In the Supreme Court of the United States

OCTOBER TERM, 1987

H.J. INC., ET AL., PETITIONERS

v.

NORTHWESTERN BELL TELEPHONE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether petitioners alleged a "pattern of racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. IV) 1961-1968.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	4
Argument:	
A. A RICO pattern of racketeering activity does not require multiple separate schemes	5
B. A RICO "pattern" is present whenever the commission of each predicate offense is not isolated from the commission of the others	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bank of America v. *Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986) 4
Barticheck v. *Fidelity Union Bank/First Nat'l State*, 832 F.2d 36 (3d Cir. 1987) 4, 5-6, 7, 10, 14
Holmberg v. *Morrisette*, 800 F.2d 205 (8th Cir. 1986), cert. denied, No. 86-1174 (Apr. 27, 1987) 3
International Data Bank, Ltd. v. *Zepkin*, 812 F.2d 149 (4th Cir. 1987) 4
Morgan v. *Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986) 4, 10
R.A.G.S. Couture, Inc. v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985) 4
Roeder v. *Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987) 3
Russello v. *United States*, 464 U.S. 16 (1983) 10, 11, 12, 15
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 8, 10, 11, 12, 13, 15
Sun Savings & Loan Ass'n v. *Dierdorff*, 825 F.2d 187 (9th Cir. 1987) 4
Superior Oil Co. v. *Fulmer*, 785 F.2d 252 (8th Cir. 1986) 3

Cases—Continued: Page

United States v. *Boffa*, 688 F.2d 919 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983) 11
United States v. *Brooklier*, 685 F.2d 1208 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983) 11
United States v. *Caporale*, 806 F.2d 1487 (11th Cir. 1986), cert. denied, No. 86-1713 (June 26, 1987) 11
United States v. *Cauble*, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984) 19
United States v. *Colacurcio*, 659 F.2d 684 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982) 11
United States v. *Conn*, 769 F.2d 420 (7th Cir. 1985) 19
United States v. *Coonan*, 839 F.2d 886 (2d Cir. 1988) 17
United States v. *Diecidue*, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980) 18
United States v. *Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978) 18, 19
United States v. *Ellison*, 793 F.2d 942 (8th Cir. 1986), cert. denied, No. 86-5484 (Nov. 3, 1986) 19
United States v. *Garver*, 809 F.2d 1291 (7th Cir. 1987) ... 11
United States v. *Hawkins*, 681 F.2d 1343 (11th Cir.), cert. denied, 459 U.S. 994 (1982) 18
United States v. *Horak*, 833 F.2d 1235 (7th Cir. 1987) 19
United States v. *Ianniello*, 808 F.2d 184 (2d Cir. 1986), cert. denied, No. 86-1579 (June 22, 1987) 3-4, 5
7, 11, 14, 18
United States v. *Kabbaby*, 672 F.2d 857 (11th Cir. 1982) 18
United States v. *Killip*, 819 F.2d 1542 (10th Cir. 1987), cert. denied, No. 87-5221 (Oct. 5, 1987) and No. 87-5621 (Dec. 14, 1987) 19
United States v. *Love*, 767 F.2d 1052 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986) 18
United States v. *Manzella*, 782 F.2d 533 (5th Cir.), cert. denied, 476 U.S. 1123 (1986) 17-18
United States v. *Massino*, 605 F. Supp. 1565 (S.D.N.Y. 1985) 17
United States v. *Paone*, 782 F.2d 386 (2d Cir. 1986), cert. denied, No. 85-1883 (Oct. 14, 1986) 18
United States v. *Persico*, 832 F.2d 705 (2d Cir. 1987) 17

Cases—Continued: Page

United States v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) 18
United States v. *Provenzano*, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982) 19
United States v. *Riccobene*, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983) 17
United States v. *Robilotto*, 828 F.2d 940 (2d Cir. 1987), cert. denied, No. 87-963 (Jan. 11, 1988) 19
United States v. *Ruggiero*, 726 F.2d 913 (2d Cir.), cert. denied, 469 U.S. 831 (1984) 17
United States v. *Ruggiero*, 754 F.2d 927 (11th Cir.), cert. denied, 471 U.S. 1127 (1985) 17
United States v. *Santoro*, 647 F. Supp. 153 (E.D.N.Y. 1986) 17
United States v. *Stratton*, 649 F.2d 1066 (5th Cir. 1981) .. 18
United States v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) 18
United States v. *Tom*, 787 F.2d 65 (2d Cir. 1986) 17
United States v. *Turkette*, 452 U.S. 576 (1981) 7, 11, 12, 15, 17, 19
United States v. *Watchmaker*, 761 F.2d 1459 (11th Cir. 1985), cert. denied, 474 U.S. 1101 (1986) 15, 18
United States v. *Zang*, 703 F.2d 1186 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983) 19

Statutes:

Dangerous Special Offender Act, 18 U.S.C. 3575 8
18 U.S.C. 3575(e) 5, 9, 13, 14
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922:
§ 1, 84 Stat. 922-923 11
§ 904(a), 84 Stat. 947 11
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. (& Supp. IV) 1961-1968 1
18 U.S.C. (& Supp. IV) 1961(1) 6, 13, 15
18 U.S.C. (& Supp. IV) 1961(1)(A) 2
18 U.S.C. 1961(5) 6, 13
18 U.S.C. 1961 note 11, 15
18 U.S.C. 1962 .....2, 6, 12
18 U.S.C. 1962(a)-(d) 5

Statutes – Continued: Page

18 U.S.C. 1962(a) 2
18 U.S.C. 1962(b) 2, 4, 7, 11
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2, 4, 6
18 U.S.C. (& Supp. IV) 1964 3
18 U.S.C. 1964(a) 1
18 U.S.C. 1964(c) 1

Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 9

Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 9

Minn. Stat. Ann. (West. 1987):
§ 609.42.1(1) 2
§ 609.42.1(2) 2

Miscellaneous:

Blakey, *Equitable Relief Under Civil RICO,* 62 Notre Dame L. Rev. 526 (1987) 7

116 Cong. Rec. (1970):
p. 586 15
p. 591 15
p. 592 9
p. 601 15
pp. 606-607 15
p. 819 16
p. 847 9
p. 952 16
p. 962 16
p. 970 16
p. 971 16
p. 18913 16
p. 18937 16
p. 18940 8
p. 35193 8
p. 35199 16
pp. 35199-35200 16
p. 35202 10
p. 35206 16

Miscellaneous – Continued: Page

p. 35211 16
p. 35216 16
p. 35300 16
p. 35303 16
p. 35312 16
p. 35319 16
p. 35321 16
p. 35326 16
p. 35328 16

E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions: Civil and Criminal* (3d ed. Supp. 1987) 18

Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. (1969) 16

H.R. Rep. 91-1549, 91st Cong., 2d Sess. (1970) 9

H.R. Rep. 1574, 90th Cong., 2d Sess. (1968) 16

Presidient Johnson's Message on the Challenge of Crime to Our Society, H.R. Doc. 250, 90th Cong., 2d Sess. (1968) 16

S. Rep. 91-617, 91st Cong., 1st Sess. (1969) 8, 9, 13, 14, 15

United States Attorneys' Manual (Mar. 9, 1984) 12-13

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INTEREST OF THE UNITED STATES

This case concerns the meaning of the phrase "pattern of racketeering activity," which is an element of violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. IV) 1961-1968. The United States brings both criminal prosecutions and civil suits under RICO. It has a strong interest in ensuring that the "pattern" element is properly interpreted so that RICO may serve its intended function as an important means of combatting organized criminal activity.

STATEMENT

Petitioners, who are purchasers of telecommunications goods and services from respondent Northwestern Bell, brought this class action in 1986 under the civil-liability provisions of RICO, 18 U.S.C. 1964(a) and (c). They alleged that respondent Northwestern Bell and others,

from 1980 through 1986, offered, promised, or gave benefits to members of the Minnesota Public Utility Commission with the intent to influence the Commissioners in the performance of their duties as regulators of Northwestern Bell. Those acts, they alleged, were in violation of a Minnesota criminal bribery statute, Minn. Stat. Ann. § 609.42.1(1) and (2) (West 1987), and the common law of bribery. The alleged acts constituted acts of "racketeering activity" under RICO, 18 U.S.C. (& Supp. IV) 1961(1)(A), which includes acts or threats involving bribery that are chargeable under state law and punishable by imprisonment for more than one year.

Based on those allegations, petitioners asserted, in addition to state law claims (Count 1), violations of each of the four provisions of 18 U.S.C. 1962, which defines the activities prohibited by RICO. They alleged (Count 2) that Northwestern Bell had received income from a "pattern of racketeering activity" consisting of the acts of bribery, and that the income, or its proceeds, had been used in the operation of Northwestern Bell, an "enterprise" engaged in interstate commerce, in violation of Section 1962(a). They also alleged (Count 3) that respondents and others, through the same pattern of racketeering activity, had acquired or maintained an interest in or control of the Public Utility Commission, an enterprise engaged in or whose activities affected interstate commerce, in violation of Section 1962(b). They further alleged (Count 4) that respondents and others had participated in the conduct and affairs of the Public Utility Commission through the same pattern of racketeering activity, in violation of Section 1962(c). Finally, they alleged (Count 5) that respondents and others had conspired to violate Section 1962(a), (b), and (c), in violation of Section 1962(d). Petitioners alleged that they were injured by that conduct,

which caused the Commission to allow Northwestern Bell to charge their customers excessive rates for goods and services. They sought, among other relief, an injunction against Northwestern Bell and treble damages under 18 U.S.C. (& Supp. IV) 1964.

The United States District Court for the District of Minnesota granted respondents' motion to dismiss the complaint (Pet. App. A8-A47). The court read the complaint as alleging a single scheme to influence the Commissioners to the detriment of ratepayers (*id.* at A36). Accordingly, the court held (*id.* at A23, A39) that petitioners had failed to state a claim under Eighth Circuit precedent establishing that a RICO "pattern of racketeering activity" requires multiple separate schemes. *E.g.*, *Holmberg* v. *Morrisette*, 800 F.2d 205, 209-210 (1986), cert. denied, No. 86-1174 (Apr. 27, 1987); *Superior Oil Co.* v. *Fulmer*, 785 F.2d 252, 255-256 (1986).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed on the same ground (Pet. App. A3-A7).[1] The court acknowledged that its multiple-schemes requirement had been criticized by other circuits (*id.* at A6 n.3). Two judges on the panel separately stated that the requirement should at some point be reconsidered en banc (*id.* at A7). In light of the division among the circuits on the issue,[2] this Court granted the petition for a writ of certiorari on March 21, 1988.

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[1] The district court had also relied on alternative grounds to dismiss parts or all of the complaint. Those rulings were appealed but were not addressed by the court of appeals. Pet. App. A6 & n.4.

[2] No other court of appeals has adopted the Eighth Circuit's multiple-schemes requirement, and a number of circuits have expressly or implicitly rejected it, at least as a rigid rule. See *Roeder* v. *Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); *United States* v. *Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986), cert. denied, No. 86-1579

SUMMARY OF ARGUMENT

The RICO pattern element does not require that the predicate offenses be committed in furtherance of multiple separate schemes. RICO nowhere uses the term "scheme," but instead contemplates that a pattern may be formed by multiple "acts," "threats," and "offenses." The Eighth Circuit's focus on "schemes" introduces a new concept into the statute that not only is hard to define but is out of place in many contexts: predicate crimes such as murder or robbery may form a clear "pattern" without any of the crimes being part of any "scheme."

The requirement of *multiple* schemes compounds the error. The requirement would enormously confuse, if not eliminate, the RICO conspiracy prohibition of Section 1962(d), since a single conspiracy would ordinarily encompass only a single "scheme." It would also severely undermine Section 1962(b), which plainly prohibits engaging in a pattern of racketeering activity to further a single scheme to take over a legitimate business. Finally, the requirement gets exactly backwards the intent of the "pattern" element, which was to ensure that the predicate crimes be tied together, not that they be separated.

We submit that a RICO pattern is present whenever the defendant's acts of committing the predicate offenses are not isolated or sporadic. This notion is reflected in the legislative history of RICO and is supported by Congress's

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(June 22, 1987); *Barticheck* v. *Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987); *International Data Bank, Ltd.* v. *Zepkin*, 812 F.2d 149, 154-155 (4th Cir. 1987); *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985); *Morgan* v. *Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *Sun Savings & Loan Ass'n* v. *Dierdorff*, 825 F.2d 187, 192-193 (9th Cir. 1987); *Bank of America Nat'l Trust & Savings Ass'n* v. *Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986).

definition of the same term in 18 U.S.C. 3575(e), which was enacted as part of the same statute that contained RICO and had similar aims. The pattern element does not require that the predicate crimes be similar in character, as Congress recognized that organized crime, which was the principal target of the statute, engages in a wide range of criminal activity. Rather, it is the defendant's acts in committing multiple predicate offenses, however dissimilar, that must not be isolated. That requirement is satisfied when the acts form a pattern by virtue of a connection to a common scheme, plan, or motive. More particularly, the requirement is satisfied when the acts are all committed in furtherance of an ongoing criminal enterprise, or are related in other ways to such a criminal enterprise, for such crimes present the threat of continuing harm to society that was the focus of Congress's concern in enacting RICO.

ARGUMENT

A. A RICO Pattern of Racketeering Activity Does not Require Multiple Separate Schemes

All four types of RICO violations, defined in 18 U.S.C. 1962(a)-(d), require proof of a "pattern of racketeering activity" as well as other elements. The Eighth Circuit, in this case and in prior cases, has held that the pattern element requires proof of multiple separate schemes. Under the Eighth Circuit's view, multiple acts of racketeering activity, if they are all part of a common scheme, cannot form the requisite "pattern." That construction of RICO is incorrect.

1. The multiple-schemes requirement "is not grounded in the statutory language of RICO." *United States* v. *Ianniello*, 808 F.2d 184, 192 n.16 (2d Cir. 1986), cert. denied, No. 86-1579 (June 22, 1987). See *Barticheck* v. *Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir.

1987) (multiple-schemes requirement "appears nowhere in the RICO statute"). Section 1961(5) provides that " 'pattern of racketeering activity' requires at least two acts of racketeering activity" committed within a ten-year period. Section 1961(1) in turn defines "racketeering activity" to mean (1) "any act or threat" that involves certain state-law crimes, including murder, kidnaping, gambling, arson, robbery, bribery, and dealing in narcotic or other dangerous drugs; (2) "any act" that is indictable under certain federal criminal laws; or (3) "any offense" that is punishable under certain federal securities-fraud, bankruptcy-fraud, or narcotics laws.

Those provisions speak solely in terms of "acts," "threats," and "offenses." They do not speak in terms of "schemes." The provisions contemplate that a series of acts, threats, or offenses—such as multiple murders or multiple gambling crimes or multiple narcotics offenses—can constitute a pattern. In many of those situations, the notion of "scheme" is simply out of place: individual predicate crimes such as murder, narcotics dealing, and gambling, or a series or such offenses that are sufficiently related to form a pattern, may not involve any "scheme" at all. And even when each of the predicate offenses is related to a "scheme" of some sort, there is no basis in the statutory language for eliminating RICO's coverage of multiple predicate offenses solely because all of the offenses are committed in furtherance of a single common scheme.

2. The Eighth Circuit's requirement of multiple separate schemes would severely undermine several of the prohibitions set forth in Section 1962. Thus, a violation of Section 1962(d), RICO conspiracy, requires proof of a single conspiracy to violate any of the other RICO provisions; yet, in the Eighth Circuit's view, those provisions

themselves require proof of more than one "scheme." Since a single conspiracy ordinarily would encompass a single scheme, the Eighth Circuit's requirement would make a RICO conspiracy violation impossible to prove, or else require linguistic contortions unwarranted by the statute. See Blakey, *Equitable Relief Under Civil RICO*, 62 Notre Dame L. Rev. 526, 538 n.37 (1987).

As the Second Circuit pointed out in *United States* v. *Ianniello*, 808 F.2d at 192, a multiple-schemes requirement also would virtually read Section 1962(b) out of the statute. Section 1962(b) prohibits acquiring or maintaining an interest in or control over an enterprise through a pattern of racketeering activity. It thus squarely prohibits engaging in a pattern of racketeering activity to further a single scheme of taking over or maintaining control of a single enterprise. An example of the kind of conduct that Congress intended to reach through Section 1962(b) is a series of acts of extortion designed to gain control of a legitimate business. Under the Eighth Circuit's view, however, no "pattern" would be present where the predicate acts are in furtherance of a single scheme to take over a single business, even if multiple extortions were committed for that purpose over a long period. That view would seem to exempt such extortionate conduct from prosecution under Section 1962(b), at least until the defendants undertook an additional scheme. That approach would gut one of the core provisions of RICO, the major purpose of which was to proscribe the infiltration of legitimate businesses by racketeering. See *United States* v. *Turkette*, 452 U.S. 576, 584, 591 (1981).[3]

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[3] Introducing the concept of "scheme" into RICO would also cause practical problems not contemplated by the statute. "Scheme" "is hardly a self-defining term" (*Bartlicheck*, 832 F.2d at 39). For example, in this case, it is hardly clear why petitioners' complaint should

3. In addition, the Eighth Circuit's multiple-schemes requirement gets the purpose of the RICO "pattern" requirement precisely backwards. The existence of a common scheme embracing the predicate acts, threats, or offenses actually supports rather than undermines a finding of the requisite pattern. To the extent that "pattern of racketeering activity" requires something more than two predicate acts, threats, or offenses standing alone, the additional requirement supplied by the term "pattern" is that the predicate acts, threats, and offenses, far from being separated into distinct schemes, must be tied together by some common element or theme so as not to be merely isolated or sporadic.

The evidence of Congress's intent in enacting RICO in 1970 supports this natural meaning, as this Court explained in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). The Senate Committee (S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969)) stated that the pattern requirement was intended to exclude cases involving only "sporadic activity" and that, as a consequence, a pattern is formed by racketeering activity that exhibits "continuity plus relationship." Senator McClellan, the chief Senate sponsor, explained that a RICO pattern is not formed by "two widely separated and isolated criminal offenses," but requires a "relationship" between the predicate acts (116 Cong. Rec. 18940 (1970)). Representative Poff echoed that theme, explaining that RICO was "not aimed at the isolated offender" (*id.* at 35193).

The same idea is reflected in the Dangerous Special Offender Act, 18 U.S.C. 3575, which was enacted as part of

not be read as alleging, in addition to a single overall scheme to obtain continuing influence with the Public Utility Commission, multiple smaller schemes to obtain favorable treatment in several particular rate-setting votes over the six-year period covered by the complaint.

the same 1970 statute that contained RICO. Like RICO, the Dangerous Special Offender Act had organized crime as a central focus (*e.g.*, S. Rep. 91-617, *supra*, at 88; 116 Cong. Rec. 592 (1970) (remarks of Sen. McClellan)), and like RICO, it provided for special long sentences for certain persons based on their involvement in a "pattern" of criminal conduct.[4] Unlike RICO, however, the Dangerous Special Offender Act contained a detailed definition of the term "pattern": Congress stated that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events" (18 U.S.C. 3575(e)).

The use of the same term in a companion provision of the same statute strongly suggests that Congress intended the term to have the same meaning when used in RICO. The legislative history supports that view. See S. Rep. 91-617, *supra*, at 164 (the pattern requirement of Section 3575(e) "precludes the application of the provision to an isolated offense"); S. Rep. 91-617, *supra*, at 165 (acts must "bear relationships to one another"); H.R. Rep. 91-1549, 91st Cong., 2d Sess. 22 (1970); 116 Cong. Rec. 847 (1970) (remarks of Sen. Hruska) (Section 3575(e) "pattern" means "not an isolated example"). The inclusion of the definition in the Dangerous Special Offender Act, but not in RICO, does not reflect an intention to give the term "pattern" different meanings in the two statutes. Rather, the definition of "pattern" in the Dangerous Special Offender Act was added by the House pursuant to a sug-

[4] The Dangerous Special Offender Act was repealed effective November 1, 1987. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728.

gestion from the American Bar Association that was designed to provide "further elaboration" and "increased specificity." 116 Cong. Rec. 35202 (1970).

These materials, which nowhere mention "schemes," indicate that, to the extent Congress chose the term "pattern" to restrict the scope of RICO, it did so simply to ensure that the commission of several predicate acts, threats, or offenses, each isolated from and having nothing to do with the others, would not trigger the special penalties of RICO. The aim was to focus the statute on groups of predicate crimes that are connected in some way. It is certainly a sufficient condition for a case to be within that focus that the predicate crimes are all committed in furtherance of a single common scheme, because such crimes are not isolated. The Eighth Circuit's reading of "pattern" to demand *separate* schemes, by requiring that the predicate crimes be disconnected, stands the "pattern" requirement on its head.[5]

4. Finally, because the multiple-schemes requirement "would exempt from RICO liability defendants who engage in only a single unlawful scheme, however extensive and injurious," the requirement "is plainly inconsistent with the purposes of the statute." *Barticheck,* 832 F.2d at 39. See *Morgan* v. *Bank of Waukegan,* 804 F.2d 970, 975 (7th Cir. 1986). "[T]he RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello*

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[5] Indeed, Justice Powell, in his dissent in *Sedima, S.P.R.L.* v. *Imrex Co.,* 473 U.S. 479, 528 (1985), would have read RICO's "pattern" element as *requiring* that the predicate crimes "be part of some common scheme." We do not think a common scheme is a necessary condition, because, as we have explained, the notion of "scheme" does not appear in the statute and is out of place in many contexts. But we agree that the existence of a common scheme is a sufficient condition to establish that the predicate crimes form the required pattern.

v. *United States,* 464 U.S. 16, 26 (1983). Congress expressed the intention that RICO be used to attack the full range of organized crime's activities (18 U.S.C. 1961 note; Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-933), and it stated that RICO's provisions "shall be liberally construed to effectuate its remedial purposes" (18 U.S.C. 1961 note; § 904(a), 84 Stat. 947). See generally *Sedima,* 473 U.S. at 497-498; *Russello,* 464 U.S. at 26-29; *Turkette,* 452 U.S. at 586-589. As is most evident in Section 1962(b), which proscribes even a single scheme to take over a single enterprise through multiple predicate crimes, RICO properly covers a wide variety of situations where multiple crimes might be found to constitute a "single scheme." *E.g., United States* v. *Garver,* 809 F.2d 1291, 1300 (7th Cir. 1987); *Ianniello,* 808 F.2d at 189-192; *United States* v *Caporale,* 806 F.2d 1487, 1502 n.20 (11th Cir. 1986), cert. denied, No. 86-1713 (June 26, 1987); *United States* v. *Boffa,* 688 F.2d 919, 934 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983); *United States* v. *Brooklier,* 685 F.2d 1208, 1217 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983); *United States* v. *Colacurcio,* 659 F.2d 684, 688 n.4 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982). The Eighth Circuit's view would gravely impair RICO's ability to combat that activity, without any justification in the language or legislative history of the statute.

B. A RICO "Pattern" Is Present Whenever the Commission of Each Predicate Offense Is not Isolated from the Commission of the Others

In deciding this case, there is no need for this Court to adopt a general definition of the term "pattern" intended to resolve issues other than the one presented here. The analysis above is sufficient to show that the Eighth

Circuit's multiple-schemes rule is incorrect, and to the extent that other questions of interpretation may arise, the Court should await cases that present them. Nevertheless, because the resolution of this case requires some discussion of the meaning of the phrase "pattern of racketeering activity," and because of the potential effect on federal RICO prosecutions of any opinion this Court files in this case, we briefly discuss several additional aspects of the meaning and application of RICO's pattern element.

1. We note at the outset two points that must inform the interpretation of the RICO pattern element. First, "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see *United States* v. *Turkette*, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, § 904(a), 84 Stat. 947." *Sedima*, 473 U.S. at 497-498. See also *Russello*, 464 U.S. at 26-29. Second, proof of a "pattern" establishes only one element of a RICO violation. In particular, under all four subsections of Section 1962, an "enterprise" must also be proved; and while "the proof used to establish these separate elements may in particular cases coalesce," the enterprise and the racketeering pattern are distinct elements, with the former demanding proof of an ongoing organization that functions as a continuing unit (*Turkette*, 452 U.S. at 583). Therefore, even a liberal construction of the term "pattern," as called for by RICO and this Court's decisions, does not convert every series of related criminal acts into a RICO violation.[6]

[6] Insofar as criminal prosecutions under RICO are concerned, it is relevant to note that all RICO prosecutions must be approved by the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice (see *United States Attorneys' Manual* § 9-110.101 (Mar. 9, 1984)) and that the Department has established a general policy against charging multiple predicate acts based on a single episode of criminal conduct. The establishment of that policy as a matter of prosecutorial discretion, of course, does not restrict the scope of the statute. Moreover, partly because of the difficulty of defining the concept of a criminal "episode," exceptions to the policy are sometimes recognized.

2. The Senate Report on the bill that became the RICO statute stated that it is the factor of "continuity plus relationship" that "combines to produce a pattern." S. Rep. 91-617, *supra*, at 158; see *Sedima*, 473 U.S. at 496 n.14. There is, however, nothing talismanic in the phrase "continuity plus relationship." Neither the Senate Report nor the *Sedima* footnote that quotes it suggests that the phrase is anything but an attempt to characterize a statutory concept that is difficult to define with great precision.

Congress did not intend anything narrower by the concept of "pattern" than that the commission of the predicate offenses must not be "isolated" or "sporadic." See *Sedima*, 473 U.S. at 496 n.14. The same idea is captured in Congress's definition of "pattern" in 18 U.S.C. 3575(e), which could appropriately be borrowed as an explanation of the term in RICO. The references to "continuity plus relationship" and the "threat of continuing activity" in the Senate Report require no more restrictive a view.

The Senate Report did not use the phrase "continuity plus relationship" to impose a requirement that the predicate crimes form an uninterrupted chain of similar events proximate in time. Any such requirement would be flatly contrary to Section 1961(1) and (5), which expressly contemplates that a wide variety of predicate offenses committed as much as ten years apart can form a pattern.

Rather, the Senate Committee used the notion of "continuity plus relationship" in order to make clear that what must be related in some fashion is not the intrinsic features of the predicate crimes but the defendant's acts in committing those crimes. For example, two extortions or two mail frauds might be said to have a "relationship" by virtue of the similarity of the crimes but still be "isolated" acts of the defendant and hence outside the intended reach of RICO because they lack "continuity." Continuity would be supplied, however, if the acts were related in some way that reflected a risk of continuing harm to society – for example, if the crimes were committed as part of the ongoing activities of a criminal enterprise. *United States* v. *Ianniello*, 808 F.2d at 192. It was precisely that threat that Congress had in mind when it wrote the broad definition of "pattern" in Section 3575(e).[7]

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[7] A RICO pattern does not require separate proof that the defendant presents a "threat of continuing [criminal] activity" (S. Rep. 91-617, *supra*, at 158) in the future: the pattern itself establishes the threat. As the Third Circuit explained in the civil RICO context, there is no "requirement of 'open-endedness.' At the very least, such a requirement would produce anomalous results. This approach would allow a party to maintain a RICO claim if he brought suit before the unlawful scheme had attained its objective; in such a case the scheme would presumably be considered open-ended. This same interpretation, though, would deny a RICO cause of action in a case where the scheme had fully accomplished its goal. Yet it is the completed scheme that inflicts the greater harm and more strongly implicates the remedial purposes of RICO." *Barticheck*, 832 F.2d at 39. Similarly in the criminal context: a defendant whose past acts form a pattern of racketeering activity is not rendered immune from RICO prosecution because there is no separate indication that he will continue his criminal activity.

In addition, the RICO pattern element contains no requirement that the predicate crimes be separated by any particular interval in time. There is no basis, for example, for reading RICO to distinguish an individual who commits three murders in rapid succession, all to serve

3. Although similarity in the character of the predicate crimes (*e.g.*, all are extortions or all are mail frauds) can help establish the requisite pattern, RICO does not require it. Limiting the term "pattern" to crimes of similar character would undermine the express congressional purpose to attack organized crime in all of its varied activities. See *Sedima*, 473 U.S. at 487, 488; *Russello*, 464 U.S. at 26; *Turkette*, 452 U.S. at 588-590. Congress recognized that organized crime engages in "diversified" activities such as "syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation" (18 U.S.C. 1961 note (Statement of Findings and Purpose)). The broad range of crimes included in Section 1961(1)'s definition of "racketeering activity" reflects that recognition. And the legislative history is replete with statements indicating congressional awareness that organized crime groups engage in a wide variety of criminal conduct. See, *e.g.*, S. Rep. 91-617, *supra*, at 41 ("gambling, narcotics, loan sharking, or other illegal businesses"); 116 Cong. Rec. 586 (1970) (remarks of Sen. McClellan) ("[s]yndicated gambling, the importation * * * and distribution of narcotics, and loan sharking"); *id.* at 591 (remarks of Sen. McClellan) ("narcotics, loan sharking, prostitution, and bootlegging"); *id.* at 601 (remarks of Sen. Hruska) ("gambling, narcotics, and loansharking"; "robbery, larceny, and arson"); *id.* at 606-607 (remarks of Sen. Byrd ("[s]yndicated gambling,

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the goal of furthering a criminal enterprise, from one who commits them over the course of several days: in either event, such multiple offenses are sufficient to constitute a pattern. See *United States* v. *Watchmaker*, 761 F.2d 1459, 1463-1464 (11th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); *United States* v. *Salerno*, appeal pending, No. 87-1075 (2d Cir.).

loan sharking, prostitution, narcotics trafficking, and similar illicit enterprises"); *id.* at 819 (remarks of Sen. Scott) ("gambling, loan sharking, narcotics, prostitution, and other forms of vice")[8]

Against the backdrop of Congress's sweeping aim to combat organized crime, RICO cannot be read to exclude an individual who commits a number of predicate crimes in furtherance of an organized criminal enterprise simply because the acts are dissimilar in nature, methods of commission, or victims. A restrictive construction of the "pattern" element would strike at the heart of Congress's concern in enacting RICO, which was clearly designed to reach the organized-crime figure who engages in a pattern of criminal conduct that includes, for example, some bribery, some extortion, some loansharking, some narcotics dealing, and some murder. All such conduct should be chargeable as part of the required pattern; there is no

[8] See also 116 Cong. Rec. 952 (1970) (remarks of Sen. Thurmond); *id.* at 962 (remarks of Sen. Murphy); *id.* at 970 (remarks of Sen. Bible); *id.* at 971 (remarks of Sen. Williams); *id.* at 18913, 18937 (remarks of Sen. McClellan); *id.* at 35199 (remarks of Rep. Rodino); *id.* at 35199-35200 (remarks of Rep. St Germain); *id.* at 35206 (remarks of Rep. Kleppe); *id.* at 35211 (remarks of Rep. Kyl); *id.* at 35216 (remarks of Rep. McDade); *ibid.* (remarks of Rep. Donohue); *id.* at 35300 (remarks of Rep. Mayne); *id.* at 35303 (remarks of Rep. Railsback); *id.* at 35312 (remarks of Rep. Brock); *id.* at 35319 (remarks of Rep. Anderson); *id.* at 35321 (remarks of Rep. Price); *id.* at 35326 (remarks of Rep. Vanik); *id.* at 35328 (remarks of Rep. Meskill); *Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 108 (1969) (statement of Attorney General Mitchell); H.R. Rep. 1574, 90th Cong., 2d Sess. 5 (1968); *President Johnson's Message on the Challenge of Crime to Our Society*, H.R. Doc. 250, 90th Cong., 2d Sess. 11 (1968).

warrant for requiring that there be two instances of a particular type of crime and restricting the pattern charged to only one such type. Not surprisingly, the courts have not adopted any such construction, but have consistently recognized that a RICO pattern may be formed by predicate crimes that are not intrinsically similar. See, *e.g.*, *United States* v. *Persico*, 832 F.2d 705, 708-709 (2d Cir. 1987) (predicate crimes included loansharking, gambling, bribery, labor payoffs, and embezzlement); *United States* v. *Ruggiero*, 754 F.2d 927, 929-930 (11th Cir.), cert. denied, 471 U.S. 1127 (1985) (gambling, bribery, and distribution of narcotics); *United States* v. *Ruggiero*, 726 F.2d 913, 915-918 (2d Cir.), cert. denied, 469 U.S. 831 (1984) (conspiracy to murder, narcotics distribution, conducting an illegal gambling business, conspiracies to rob, and attempted robbery); *United States* v. *Riccobene*, 709 F.2d 214, 216-220 (3d Cir.), cert. denied, 464 U.S. 849 (1983) (gambling, mail fraud, wire fraud, and extortionate credit transactions); *United States* v. *Massino*, 605 F. Supp. 1565, 1569, 1571 (S.D.N.Y. 1985) (*e.g.*, conspiracies to murder, obstruction of justice, and conspiracy to rob); *United States* v. *Santoro*, 647 F. Supp. 153, 156-157, 174-178 (E.D.N.Y. 1986) (extortion, labor payoffs, and mail fraud). See also *Turkette*, 452 U.S. at 579 ("group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings").[9] The standard jury in-

[9] See also *United States* v. *Coonan*, 839 F.2d 886, 887 (2d Cir. 1988); *United States* v. *Tom*, 787 F.2d 65, 67 (2d Cir. 1986); *United*

struction also reflects this view. See E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions: Civil and Criminal* § 56.23, at 807-808 (3d ed. Supp. 1987) ("it is not necessary that the two acts found be of the same kind, or nature").

4. As we have explained, the thread of continuity needed to tie together the commission of predicate crimes so that they form a pattern is present at least when, in the words of the standard jury instruction, each predicate crime is "connected with the other by some common scheme, plan or motive so as to constitute a pattern" (E. Devitt, C. Blackmar, & M. Wolff, *supra,* § 56.23, at 807-808). Thus, a common scheme, plan, or motive to benefit or further a criminal enterprise is certainly a sufficient basis for finding that predicate crimes constitute a pattern. *E.g., United States* v. *Ianniello*, 808 F.2d at 192 ("common purpose of furthering a continuing criminal enterprise with which the person is associated"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). The thread of continuity, and hence the required pattern, is also present where predicate crimes are com-

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States v. *Manzella*, 782 F.2d 533, 536 (5th Cir.), cert. denied, 476 U.S. 1123 (1986); *United States* v. *Paone*, 782 F.2d 386, 388-390 (2d Cir. 1986), cert. denied, No. 85-1883 (Oct. 14, 1986); *United States* v. *Love*, 767 F.2d 1052, 1055-1056 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Watchmaker*, 761 F.2d 1459, 1463-1464 (11th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); *United States* v. *Hawkins*, 681 F.2d 1343 (11th Cir.), cert. denied, 459 U.S. 994 (1982); *United States* v. *Kabbaby*, 672 F.2d 857, 859 (11th Cir. 1982); *United States* v. *Stratton*, 649 F.2d 1066, 1070-1074 (5th Cir. 1981); *United States* v. *Diecidue*, 603 F.2d 535, 539-542 & n.1 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Elliott*, 571 F.2d 880, 884-900 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

mitted that in fact benefit an ongoing criminal enterprise (*e.g., United States* v. *Killip*, 819 F.2d 1542, 1549-1550 (10th Cir. 1987), cert. denied, No. 87-5221 (Oct. 5, 1987) and No. 87-5621 (Dec. 14, 1987); *United States* v. *Ellison*, 793 F.2d 942, 950 (8th Cir. 1986), cert. denied, No. 86-5484 (Nov. 3, 1986); *United States* v. *Zang*, 703 F.2d 1186, 1194 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983)), where such an enterprise made possible or facilitated the commission of the predicate crimes (*e.g., United States* v. *Horak*, 833 F.2d 1235, 1239-1240 (7th Cir. 1987); *United States* v. *Robilotto*, 828 F.2d 940, 947-948 (2d Cir. 1987), cert. denied, No. 87-963 (Jan. 11, 1988); *United States* v. *Killip*, 819 F.2d at 1549; *United States* v. *Cauble*, 706 F.2d 1322, 1333 n. 24, 1341 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984)), or where the predicate crimes were the defendant's way of participating in such an enterprise (*e.g., United States* v. *Conn*, 769 F.2d 420, 424-425 (7th Cir. 1985); *United States* v. *Provenzano*, 688 F.2d 194, 199-200 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); *United States* v. *Elliott*, 571 F.2d 880, 899-900 (5th Cir.), cert. denied, 439 U.S. 953 (1978)). In these and other ways, the defendant's commission of predicate crimes can form the required pattern by virtue of their relation to a criminal enterprise.[10]

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[10] We do not suggest that the mere fact that several similar crimes are all related in some way to a legitimate enterprise makes a pattern of those crimes. When the crimes are related (as described in text) to a *criminal* enterprise, however, that fact supplies the required element of continuity among the defendant's criminal acts. Just as this Court recognized in *Turkette* that proof of a criminal enterprise and the pattern of racketeering activity may coincide without the two elements being equated (452 U.S. at 583), the fact that the enterprise in certain cases helps establish the pattern in no way equates the two elements or makes one of them redundant.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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